

ClearComm

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January 14, 1998

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Ms. Magalie Roman Salas
Secretary
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Room 222
1919 M Street, N.W.
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JAN 14 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Amendment of the Commission's Rules Regarding Installment
Payment Financing For Personal Communications Services
(PCS) Licensees, FCC 97-342, released October 16, 1997
(Second Report and Order in WT Docket No. 97-82)*

Dear Madam Secretary:

On behalf of ClearComm, L.P., and pursuant to Section 1.429(h) of the Commission's rules, 47 C.F.R. § 1.429(h) (1996), I enclose an original and eleven (11) copies of its "Reply to Oppositions to Petitions for Reconsideration" in the proceeding referenced above. Kindly date-stamp and return to the courier the receipt copy of this filing designated for that purpose. You may direct any questions concerning this matter to the undersigned.

Respectfully submitted,



Tyrone Brown
Senior Vice President

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JAN 14 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of the Commission's Rules)	WT Docket No. 97-82
Regarding Installment Payment)	
Financing for Personal Communications)	
Services (PCS) Licensees)	

To: The Commission

**REPLY TO OPPOSITIONS TO
PETITIONS FOR RECONSIDERATION**

ClearComm, L.P. ("ClearComm"), by its attorney, and pursuant to Section 1.429(g) of the Commission's rules, 47 C.F.R. § 1.429(g) (1996), hereby submits its Reply to the oppositions and comments filed on December 30, 1997, in this proceeding.^{1/} Although only Fidelity Capital specifically objected to ClearComm's request for partial reconsideration of the *Order*,^{2/} several other parties also objected to the substance of the request: elimination of the 50 percent down payment forfeiture penalty that presently attends the disaggregation option.^{3/}

^{1/} *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, FCC 97-342, released October 16, 1997 (*Second Report and Order and Further Notice of Proposed Rule Making* in WT Docket No. 97-82) ("*Order*").

^{2/} See Comments of Fidelity Capital in WT Docket No. 97-82, filed December 30, 1997, at 4 ("*Fidelity Comments*").

^{3/} See Opposition to Petitions for Reconsideration, filed by Antigone Communications Limited Partnership ("*Antigone*") and PCS Devco, Inc. ("*Devco*") ("*Antigone/Devco Opposition*"); Opposition of AirGate Wireless, L.L.C. ("*AirGate Opposition*"); Sprint Corporation Opposition to Petitions for Reconsideration ("*Sprint Opposition*"). Significantly, none of these parties even attempted to oppose ClearComm's fallback position that, in recognition of the fact that disaggregating licensees are returning only half of their spectrum, the forfeiture imposed on disaggregation should be no greater than 15%, corresponding to 30% of the down payment in respect of the half of the licensee's spectrum that is being returned to the Commission.

I. INTRODUCTION

ClearComm's Petition for Reconsideration ("Petition"),^{4/} argued that the down payment forfeiture penalty, as applied to the disaggregation option, should be eliminated because: (1) the *Order* provided no reasoned explanation supporting imposition of the penalty; (2) the penalty is unsupported by the record and unwarranted as a matter of law; and (3) the penalty contravenes the statutory mandate of Section 309(j) of the Communications Act, impedes the policy objectives of the *Order*, and actually aggravates the effects of the present capital crisis facing C block licensees by denying them the productive use of precious capital they have already raised.^{5/} ClearComm eschewed any interest in a refund, asking only that the residual down payment funds of disaggregating small business licensees be applied toward the licensees' outstanding interest obligations.^{6/}

The pleadings expressing opposition to eliminating the 50 percent down payment penalty do not undermine any of the grounds of ClearComm's request. They wholly fail to grasp the critical differences which distinguish disaggregating licensees from those who abandon most of their markets and prepay others, attempting to justify the Commission's penalty on the former by reference to rationales which logically apply only to the latter. In so doing, the opposing parties simply miss fundamental policy goals the Commission sought to achieve with the disaggregation option.

Ironically, the oppositions serve only to establish that the fundamental rationale for the forfeiture is punitive. But punishment, as the Petition's discussion of the disaggregation option makes clear, erodes the viability of the disaggregation option and, therefore, cannot possibly serve as the basis for sustaining the 50 percent down payment forfeiture. Indeed, the notion of punishment is

^{4/} Petition for Partial Reconsideration of ClearComm, L.P., filed November 24, 1997, in WT Docket No. 97-82 (hereinafter, in text, "Petition," and cited as, "ClearComm Petition").

^{5/} *Id.* at 6-18.

^{6/} *Id.* at 13-18.

fundamentally inconsistent with the Commission's dual role here as lender and regulator which requires the Commission to factor into its public interest calculus an analysis of the commercial reasonableness of its regulatory remedies. The disaggregation down payment forfeiture penalty simply does not pass the commercial reasonableness test and, therefore, renders the Commission's decision arbitrary and capricious. The elimination of the forfeiture would cure this defect and render the Commission's decision eminently sustainable and reasonable.

The Commission recently signaled its disinclination to "depart in any material way" from the path it took in the *Order*.^{7/} ClearComm respectfully submits that the modification proposed in its Petition is extremely narrow and does not constitute a "material" departure from the *Order*'s overall remedial plan. Nevertheless, ClearComm believes that it is an absolutely critical change if disaggregation is to be a meaningful alternative for C block small business licensees imperiled by the present crisis in the capital markets.

II. RETENTION OF THE 50 PERCENT FORFEITURE PENALTY ON THE DISAGGREGATION OPTION WOULD BE ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW

The critical and harmful impact that the disaggregation down payment forfeiture will have on licensees is underscored by the clear majority of petitioners who concurred in ClearComm's request to eliminate it. Twenty-one of the 37 petitions filed, by both large and small licensees,^{8/} advocated the elimination of the forfeiture on disaggregating licensees. In sharp contrast, neither

^{7/} See *Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Service (PCS) Licensees*, FCC 98-2, released January 7, 1998 ("*Election Extension Order*").

^{8/} See, e.g., Petitions for Reconsideration filed by Omnipoint Corporation; Alpine PCS, Inc.; Cellexis International, Inc.; MFRI, Inc.; RFW PCS, Inc.; and NextWave Telecom, Inc.

Fidelity nor any of the other parties who oppose elimination of the forfeiture have provided any compelling rebuttal to ClearComm's arguments.

The Supreme Court has stated that an agency's action will be found arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency. . . ." ^{9/} The FCC's imposition of the down payment forfeiture on disaggregation manifests both of these defects.

First, setting aside for the moment that the Commission has provided no explanation for imposing the 50 percent penalty, it appears clear that the purpose for the forfeiture is punitive. ^{10/} However, such a punitive measure squarely "runs counter to the evidence before the agency," all of which establishes that such a penalty is unwarranted. The FCC has repeatedly cited the virtues of disaggregation, ^{11/} which include: helping to reduce market entry barriers; ensuring efficient spectrum use; expediting access to broadband PCS service; and facilitating competition. ^{12/} Moreover, ClearComm demonstrated in the Petition that the rationales which justified imposing forfeiture

^{9/} *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)). Moreover, even where an agency's action is supported by substantial evidence, the Court stated that it may nevertheless be arbitrary and capricious where other evidence in the record fairly detracts from the evidence supporting the agency's action. *Bowman Transportation, Inc.*, 419 U.S. at 284 & n.2.

^{10/} Indeed, Antigone/Devco concedes as much in its Opposition. See Antigone/Devco Opposition at 3 (forfeiture intended to penalize insincere bidding).

^{11/} See *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, 11 FCC Rcd 21831 (1996) (*Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 96-148 and GN Docket No. 96-113) (hereinafter, "*Disaggregation Order*"), cited in, *Order*, slip op. at 17 ¶ 32.

^{12/} See *Order*, slip op. at 22 ¶ 43 ("The relief we provide is another means of making more efficient use of the spectrum."); see also *Disaggregation Order*, 11 FCC Rcd at 21858. All of these benefits are in harmony with the objectives of the *Order*.

penalties on amnesty and prepayment cannot appropriately be applied to disaggregation, principally because the disaggregating licensee retains the obligation to serve all of the markets it won at auction.

Second, the imposition of the 50 percent forfeiture evidences the Commission's "fail[ure] to consider an important aspect of the problem," namely, the marketplace impact of the penalty on license values and the ability of licensees to avail themselves of the disaggregation option. ClearComm respectfully submits that the Commission's dual role as both lender and regulator in this case imposes upon it a duty to weigh in its public interest analysis the commercial reasonableness of its actions just as any commercial lender would do in deciding whether and how to restructure a debtor's obligations.^{13/} Here, in imposing the down payment forfeiture penalty on licensees electing the disaggregation option, the Commission's action is inconsistent with that of a reasonable commercial lender.

In the private loan "work-out" context, the objective of the process is to arrive at a debt restructuring plan which satisfies the lender's need for repayment while also preserving the value of the debtor's assets and its ability to continue as a going concern in order to meet its payment obligations. Where a lender's requirements become too burdensome or impracticable, a troubled debtor unable to employ such private restructuring mechanisms has little alternative but to resort to bankruptcy. As documented in the Petition, and reinforced by other petitioners, the Commission's requirement that licensees electing disaggregation forfeit one-half of their often substantial down

^{13/} The Commission's statutory mandate under the Communications Act is to regulate in the public interest, convenience, and necessity. The Commission must recognize that, in the present circumstances, an integral part of discharging that duty is to comport itself in a commercially reasonable manner by fashioning, where possible, remedial options that permit licensees to remain in operation, thereby expediting the roll-out of competitive, new wireless service to the public. Commercially unreasonable measures which encourage licensees to resort to bankruptcy, miring licenses indeterminately in the judicial process, deprive the public of new service and, thus, frustrate the public interest.

payment funds, while also retaining all of their licenses and providing service to all of their markets, simply renders that option commercially impracticable, and the Commission's failure to consider this important aspect of the problem requires that the penalty be eliminated.

III. THE OPPONENTS' ARGUMENTS ARE WHOLLY WITHOUT MERIT AND SHOULD BE REJECTED

A. Fidelity's Arguments Rest On Erroneous Factual Assertions and Policy Errors and Are Without Merit

As noted above, Fidelity is the only party objecting to elimination of the down payment forfeiture penalty which directly opposed ClearComm's Petition. Fidelity's opposition, however, serves only to highlight the legal and policy defects which warrant elimination of the penalty. Essentially conceding that the penalty lacks any reasoned explanation in the *Order* or rational basis in the record, Fidelity anemically asserts that the penalty is warranted because "the licensee's failure to commence service on the returned spectrum has imposed costs on the taxpayers through reduced competition."^{14/} Noting that the Commission's rules already recognize disaggregation as an appropriate activity, Fidelity also suggests that licensees who are dissatisfied with the terms of the Commission's disaggregation option can simply disaggregate their spectrum privately to another qualified entity.^{15/} The first of Fidelity's arguments is simply fallacious; the second runs contrary to a deliberate policy objective of the Commission.

First, the disaggregation option does not reduce competition as Fidelity asserts, but rather results in a net increase in competition: A disaggregating licensee remains in the local market as a competitor and, by relinquishing 15 MHz of its spectrum, makes it possible for another competitor

^{14/} Fidelity Comments at 4.

^{15/} *Id.*

to enter the market as well -- effectively doubling the competitors that the C block auction alone would have introduced.^{16/}

Second, Fidelity's argument favoring private disaggregation misses the mark because it overlooks the important spectrum efficiency objectives the Commission sought to achieve through the disaggregation option.^{17/} Specifically, the Commission recognized that market conditions made it likely that licensees would sell off some portion of their spectrum, and the agency specifically crafted the disaggregation option to encourage the return of spectrum to the Commission which could more efficiently redistribute it.^{18/}

Retention of the down payment forfeiture penalty, as Fidelity advocates, would place a serious, and in many cases an insurmountable, financial obstacle in front of licensees who desire to utilize the disaggregation option, thereby forcing them to turn to less spectrum-efficient alternatives like fragmentary and piecemeal private disaggregation, consolidation, or bankruptcy. Thus, the penalty is antithetical to the Commission's objectives and should be eliminated.^{19/}

^{16/} ClearComm Petition at 10.

^{17/} See *Order*, slip op. at 22 ¶ 43 ("The relief we provide is another means of making more efficient use of the spectrum.").

^{18/} As the Commission stated, "Given the current state of the market and the Commission's existing rules, it is reasonable to expect that some C block spectrum will be transferred to competitors through reauction or private sale. Our actions here [in adopting the disaggregation option] facilitate this process by reducing the amount of spectrum that would otherwise be marketed in a piecemeal fashion." *Id.*, slip op. at 23 ¶ 44 (emphasis added).

^{19/} The Commission should also reject Fidelity's suggestion that the penalty is appropriate to help defray costs associated with reauctioning the spectrum. Fidelity Comments at 18. First, Fidelity does not explain why this should be so when, as in disaggregation, the licensees are acting in the spectrum efficient manner intended by the Commission and, more importantly, are not abandoning any of the markets that they purchased in the auction. Second, Fidelity provides no evidence whatsoever concerning the asserted costs of reauctioning the returned spectrum. ClearComm respectfully submits that, to the extent that any such reauction costs exist, they would likely be negligible and, in any event, should be borne more heavily by the licensees who elect the amnesty or prepayment options and who are, thus, returning a proportionately greater percentage of their spectrum.

B. Contrary To Antigone/Devco's and AirGate's Claims, The Penalty Is Not Necessary To Prevent Insincere Bidding, And Is Unwarranted In Light Of The Substantial Public Interest Benefits Disaggregation Provides

Like Fidelity, none of the other parties opposing elimination of the forfeiture penalty on the disaggregation option musters a persuasive case to support its position. Accordingly, their oppositions must also be rejected.

Characterizing those who support elimination of the penalty as "patently insincere bidders,"^{20/} Antigone/Devco, contends that the 50 percent down payment penalty on the disaggregation option is necessary to penalize such conduct. The only support Antigone/Devco is able to marshal for this position, however, is Commissioner Ness' statement that:

If licensees were able to use 100 percent of their deposits to cherry-pick which licenses they want to keep and which they want to return, they would recoup in full what they paid and there would be no deterrent in future auctions against bidding excessively.^{21/}

Yet both Commissioner Ness' separate statement, and the *Order*, make clear that the Commissioner was addressing only those licensees electing the prepayment option -- not those electing disaggregation -- when she made this statement. Shortly after the foregoing quoted passage, Commissioner Ness goes on to state that

to accommodate some of the troubled licensees, the majority has agreed to allow them to apply up to 70 percent of the downpayments on licenses returned and 100 percent of the downpayment on licenses kept toward payment for selected licenses. The remaining 30 percent of the downpayment on returned licenses equates to the 3% of bid price default penalty specified in our rules.^{22/}

^{20/} Antigone/Devco Opposition at 3, 5. ClearComm cannot speak to the motivations that instructed other bidders' conduct in the C block auction, but insofar as ClearComm is concerned, Antigone/Devco's spurious charge of insincere bidding is baseless and false. ClearComm bid in the auction with the sincere intention of honoring its obligations and has met every obligation to the FCC that has matured to date. Antigone/Devco has provided not even a scintilla of evidence to support its charge of "patently insincere" bidding in ClearComm's case, and it should be rejected out of hand.

^{21/} *Id.*; see also *Order*, slip op. at ___, Separate Statement of Commissioner Susan Ness at 5.

^{22/} *Order*, slip op. at ___, Separate Statement of Commissioner Susan Ness at 5.

This is the penalty applicable to the prepayment option, and corresponds directly to the Commission's treatment of the prepayment option in the text of the *Order*.^{23/}

The foregoing reasoning supporting a 30 percent down payment forfeiture for the prepayment option is completely inapposite in the disaggregation context.^{24/} Disaggregating licensees are not "cherry-picking" between licenses they want to keep and those that they want to return. On the contrary, disaggregating licensees are keeping all of their licenses and the obligations which attend them: They will not abandon even a single market. Thus, Antigone/Devco's position finds no support in Commissioner Ness' statement and, accordingly, should be rejected.^{25/}

For its part, AirGate asserts that forfeiture of 50 percent of a disaggregating licensee's down payment is reasonable because the licensee's spectrum has been "off-the-market" for almost two years and the Commission has no assurance that the Commission will ultimately realize as much for the returned spectrum on reauction as the original licensee had bid.^{26/} This position is equally infirm.

First, as AirGate is well aware, the spectrum has not been off the market for two years at the behest of licensees. The crisis in the capital markets which has stalled development in the C block was not of the licensees' making. Moreover, many C block licensees, including ClearComm, have worked diligently with the Commission to bring about a remedial scheme as quickly as possible. Under these circumstances, ClearComm respectfully submits that it would be wrong further to penalize disaggregating licensees for circumstances beyond their control. Second, AirGate overlooks the other public interest advantages -- *i.e.*, increased competition, assurance of payment for the

^{23/} See *id.*, slip op. at 33 ¶ 65.

^{24/} ClearComm Petition at 9-11.

^{25/} Sprint's Opposition advances the same line of reasoning employed by Antigone/Devco. See Sprint Opposition at 4-5. Accordingly, Sprint's Opposition must also be rejected.

^{26/} AirGate Opposition at 12.

retained 15 MHz of spectrum at the net high bid price, continued commitment of service to all of a licensee's existing markets, and enhanced spectrum efficiency -- that attend disaggregation as distinguished from the other options. ClearComm also respectfully suggests that these benefits more than offset the shortcomings that AirGate has identified.

Finally, even assuming *arguendo* that some penalty on disaggregation may be appropriate, AirGate has provided no justification whatsoever for the proposition that a penalty which far exceeds that imposed on defaulting licensees (and upon licensee's electing the prepayment option) is at all reasonable. In its Petition, ClearComm urged that any penalty on disaggregating licensees should in no event exceed 15 percent (*i.e.* 30 percent of down payment in respect of the returned spectrum). The Petition established beyond question that under the facts and law the present penalty would be unfair and contrary to the law and the public interest. For this reason also, AirGate's Opposition should be rejected.

IV. CONCLUSION

For the foregoing reasons, the Commission should reject the arguments of those parties who oppose elimination of the down payment forfeiture penalty and modify the *Order* in a manner consistent with ClearComm's Petition.

Respectfully submitted,

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Date: January 14, 1998

CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, hereby certify that I have, this fourteenth (14th) day of January, 1998, caused a copy of the foregoing Reply to Oppositions to Petitions for Reconsideration, to be sent via First-Class United States Mail, postage prepaid, to each of the following:

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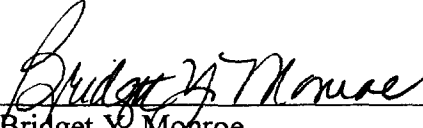
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